



## Panel: Law in the Domestic Courts of Other Nations

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### Summary

#### The Domestic Effect of EU Law

The depth of the integration of European Community law with the legal systems of the Member States is one of the most salient features of the Union's legal order. This evolution has generated a new type of interaction between different legal regimes which cannot be resolved on the basis of traditional methods concerning the reception of international law by domestic law.

The fundamental principles which govern the relationship between Community law and the laws of the Member States are not explicitly defined in the Treaty, but have been identified and refined by the Court of Justice by means of a jurisprudence based upon the objectives of the European Union.

In 1956 (Fédéchar) Advocate General Lagrange wrote:

The European Court of Justice is not an international court, but the court of a Community created by six States on a model which is more closely related to a federal than to an international organisation, and [...] although the Treaty, which the Court has the task of applying was concluded in the form of an international agreement and although it unquestionably is one, it is nevertheless, from a material point of view, the charter of the Community, since the rules of law which derive from it constitute the internal law of that Community.

The effectiveness of the case law of the Court of Justice as well as the effectiveness of Community law in general within the legal orders of the Member States has depended decisively on the attitudes adopted by the national judges.

The following three principles framed by the Court in its jurisprudence between 1963 and 1991 have been accepted not only by State courts, but also by policy maker and the academic world. In addition, they have been recognized as binding by all new States which have joined the Union in the past ten years.

#### 1. Direct Effect of EU law

Van Gend en Loos (1963) contains a number of fundamental statements regarding the characteristic features of EU law. In this case, the Netherlands and Belgium had argued before the Court that it had no jurisdiction to decide whether provisions of the Treaty could prevail over national legislation. They claimed that the solution to such a problem fell within the exclusive jurisdiction of the national courts.

The Court rejected this argument and found that the main reason for the direct effect of Treaty provisions lay in the objective of establishing a common market. The Court also held that the Union constitutes a new legal order (of international law), the subjects of which comprise not only the States but also their nationals.

The principle of direct effect is not merely a technical device which regulates the relationship between Community law and national law, but the expression of the nature of the Union as a legal community of States, peoples and citizens.

This means that rights derived from the Treaty, such as common market rights, can be enforced without state legislation. The Court has also given EU legislation

direct effect provided that three conditions are met. The Court's test is fairly straightforward: the rule must be clear and unambiguous, it must be unconditional, and its operation must not be dependent on further action being taken by Union or national authorities. Direct effect may be either horizontal or vertical. Horizontal effect means that European citizens have rights and duties relative to each other. Vertical direct effect concerns the relationship between an individual and the State.

## 2. Supremacy of EU law

The principle of direct effect is closely related to the principle of supremacy, first proclaimed in 1964. The Treaty not containing a supremacy clause the coexistence of two legal orders within the same territory, i.e. Community law and domestic law, may give rise to conflicts between the two systems. In such a situation, the Court of Justice held that Community law prevails over State law.

In *Costa* the Court highlighted that "by contrast with ordinary treaties, the Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply." The Court then argued that "by creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds their nationals and themselves."

In *Simmenthal* (1978), the Court held that all national courts must apply Community law in its entirety and protect the rights which it confers on individuals and must accordingly "set aside" any provision of national law which may conflict with it.

A national court which is called upon to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply conflicting rules of national law. It is not necessary for that court to request or await, prior to giving judgment, the setting aside of such a provision by legislative or other means.

Community law also has had a great impact on national procedures in the field of interim relief. In *Factortame* (1990) the House of Lords had raised a number of questions about the jurisdiction of national courts to grant interim relief on the basis of Community law. The main question was whether Community law obliged or empowered a national court to grant interim relief for the protection of putative and disputed rights under Community law before their existence had been established.

The affirmative answer of the Court to this question was based upon the supremacy and effectiveness of Community law as well as on the duty for national courts to ensure the legal protection which derives from the direct effect of provisions of Community law. The Court underlined that judicial review would be impaired if a national court, having stayed the proceedings pending the reply by the Court to the question referred to it for a preliminary ruling, were not able to grant interim relief.

### 3. State Liability

The third line of influence of EU law upon domestic legal systems is the most recent. The Treaty is silent on the question as to whether States may be liable in damages to injured parties for breaches of Community law. The State liability

principle was stated for the first time in Francovich (1991) which dealt with the non-implementation of a particular EU directive.

The Court held that three conditions for such a liability must be fulfilled:

- the directive must involve rights conferred upon individuals;
- the content of these rights must be identified on the basis of the directive;
- a causal link between the State's failure and the damage sustained must exist.

The Court said:

It should be borne in mind at the outset that the Treaty has created its own legal system, which is integrated into the legal system of the States and which their courts are bound to apply. The subjects of that legal system are not only the States but also their nationals. Just as it imposes burdens on individuals, community law is also intended to give rise to rights which become part of their legal patrimony. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the States and the Community institutions.

[...]

The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a State can be held responsible [...].

In *Brasserie du Pêcheur and Factortame* (1996) the Court refined the conditions under which a State incurs liability for breaches of Community law.

In its later case law the Court has extended the principle of State liability to all actions or omissions of any public authority, including national courts.

In *Köbler* (2003) the Court held:

Consequently, it follows from the requirements inherent in the protection of the rights of individuals relying on Community law that they must have the possibility of obtaining redress in the national courts for the damage caused by the infringement of those rights owing to a decision of a court adjudicating at last instance.

The duties of State courts to protect Community rights have been further refined in *Traghetti del Mediterraneo* (2006).

## Conclusions

Supremacy, direct effect and State liability: all these principles involve a level of interplay between Community law and national law which is unprecedented in relations between international law and the domestic law of States. They challenge the traditional hierarchy of norms and involve a significant shift in transnational legal relations.

They also highlight the often difficult role that national courts have to play when called upon to apply the law in cases which involve an interface between Community law and domestic law.

Today, three major conclusions can be drawn from the Court's jurisprudence which has responded to questions raised by a representative range of States, such Holland, Italy, Britain, Germany and Austria:

First, State courts have been willing to raise questions regarding the relationship between Community law and domestic law. Second, the Court, by answering these questions, has established the most important legal principles of the Union. Third, this case law has been accepted by all other States, their courts and governments. These principles have become – as French legal terminology says – "acquis communautaire."